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HARVARD LAW REVIEW

VOL. XXIX

MAY, 1916

NO. 7

A COMPENSATION PLAN FOR RAILWAY ACCIDENT CLAIMS

I

CRITICISM of the administration of justice has been chiefly directed at matters of procedure; delay is the evil as to which complaint is traditional. Consideration of what questions should be handled by the courts is, however, even more important than the consideration of how court questions are handled. As to many cases, the true criticism is not that trials should take place sooner, but that trials should not take place at all. Certain conflicts of interest are being dealt with to-day upon principles bound to bring about court contests, which by appropriate legislation might be dealt with upon other principles permitting speedy adjustments without suits.

More numerous than any other single class of cases in most city courts are suits against railroad and street railway corporations for damages on account of personal injuries. In some cities from a third to a half of the time of jury sessions is occupied with these cases. The principles governing the rights and liabilities of the parties in such suits are well settled. Those rules are, however, such as to invite if not to necessitate the litigation of almost every accident claim of importance. Not only do the cases have to be fought out in the trial courts; there is also at least in many states strong reason for the defeated party to carry his case to the court of last resort. Had these rules been worked out for the express

purpose of encouraging litigation and multiplying suits they would reflect great credit upon their framers.

As the law now stands, it is not possible for a passenger who has been injured in a railway accident to learn without suit the amount of damages which can be recovered. Suppose, for example, that Mrs. Smith has sustained a fracture of an arm as the result of a sudden lurch of a street car in which she was riding. To become informed as to her rights against the company she must consult a lawyer. The lawyer will tell her that her right to recover damages from the company depends in the first place upon her ability to prove that the lurch was caused by some fault upon the part of an employee of the company. The fault might have been in the operation of the car, and to prove this it would be necessary to show how a car should have been operated under the conditions which prevailed at the time of the accident, and just how the motorman or conductor failed to observe the proper standard of conduct. Or the negligence might have consisted in the use of improper appliances, or in failing to keep up the equipment of a car or the condition of the road bed and tracks. To establish such negligence it would probably be necessary to call electrical engineers, civil engineers, or other experts.

Mrs. Smith would be further told that she must be prepared to show that she was looking out properly for her own safety or at least to meet any evidence of carelessness upon her part which might be put in by the company; for if she herself was even partially to blame she could not recover, no matter what was the carelessness of the employees. She would be informed that if she proved the negligence of an employee of the company, and her own freedom from blame, she would be entitled to damages, including not only her full monetary loss, in which would be included every expense, except her attorney's fees, but also indemnity for suffering and for any resulting physical defect or trouble.

Somewhat bewildered by these details Mrs. Smith might ask, "But just how much can I recover, and what certainty is there of a verdict in my favor?" The only honest answer in the majority of cases is: "Well, that all depends upon how you and your case will happen to strike the jury." If she inquires when she will be paid, the answer would probably be that to secure payment within a year would be remarkably fortunate, and that she might have to

wait two or more years before actually recovering. An expensive, uncertain, and tedious suit may thus be the only alternative to a small settlement.

Strange as it may seem, the situation of the company under the present law is almost equally unsatisfactory. It is true that the company has much better facilities and opportunity for getting evidence than has Mrs. Smith, but unless the company secures overwhelming evidence in its favor the case will be allowed by the judge to go to the jury for decision, and what the jury will do is likely to be based less upon the evidence than upon the natural feeling in favor of the injured individual as against the impersonal corporation. A modern lawyer, discarding ancient similes, would be likely to venture a restatement of a certain spiritual truth, as follows: "It is as difficult for a rich man to enter the Kingdom of Heaven as for a large corporation to obtain a verdict in a personal injury case."

Besides this natural prejudice there is for the company the constant menace of fraud. Stirring up and prosecuting personal-injury cases has become the trade of certain attorneys. The "ambulance chaser" is the tool that draws in their victims. In suits so instituted there is a premium upon perjury — perjury to establish liability, perjury to enhance damages. There are doctors who make a business of skilfully instructing plaintiffs in the simulation of injuries. To ward off verdicts often secured by such methods, it is almost inevitable that claim agents of companies should sometimes resort to sharp methods. A bad odor emanates from the whole field of this personal-injury litigation.

Facilities for the trial of these cases are provided by the state, at large expense. The cost of a single day's sitting of the jury session may be three hundred dollars, and the trial of an ordinary accident case may take three or four days. Under the system generally in force all this court expense is borne by the state. Large sums raised by taxation are thus expended in providing the machinery for carrying on these wearisome disputes.

There is no sound business reason for maintaining this system, cumbrous, trouble breeding, and costly in its operation. An altogether simpler method is available for the adjustment of such claims — a method based upon the ideas which have in recent years found beneficent expression in the workmen's compensation acts.

II

The idea underlying the present system is that fault is the true ground for the determination of tort as well as of criminal liability. If fault of the defendant caused the accident, the defendant is liable to the plaintiff; if there was no fault there is no liability; and if there was as a contributing cause fault on the part of the plaintiff, there is no liability. Once liability is established, the offender must do everything that money can do to wipe out the fault. The exact amount of damages, both financial and physical, must be determined by a jury and the offending defendant must pay the injured person the full sum.

At first blush this theory seems just and reasonable, although manifestly the attempt to apply it under present conditions results in uncertainty, trouble, and waste. The present rules, however, do not in fact possess even the meager merit of logical coherence, for the money which under the rule as now applied goes in reparation for the fault is not the money of those guilty of the fault. Fault is always personal — it is that of an engineer, of a motorman, of an inspector — but the money that goes in these cases to make good the fault is the money of the stockholders who constitute the company. The conduct of the stockholders, or even of the directors who immediately represent the stockholders, is not even an issue in the suits. Under the present rules the conduct of one man or set of men is elaborately investigated in order to determine and fix the liability of another man or set of men.

An insurance system for dealing with accident claims would be based upon two distinctive principles and a distinctive method. The first principle is, of course, that of liability irrespective of negligence, liability which would be absolute except when the injury was caused by gross or wilful carelessness of the passenger. This rule is founded upon conviction that the cost of the transportation service should include the expense of insuring the passenger against all risks peculiar to the service for which he pays his fare. Its application would largely eliminate difficult and costly investigation of the causes of each accident.

The second principle would be that of limited liability, that is, liability for a fixed reasonable sum for each injury or loss, instead of for such amount as a jury may happen to assess as representing the full money equivalent of the injury. This principle is founded

upon the belief that exact money compensation for physical injury, now supposed to be determined by juries, is impossible, and that if companies are held as insurers and not as wrongdoers there is no reason why the entire risk involved in the transportation service should be borne by the transportation agency. If the company provides a reasonable but prompt and sure compensation, persons who believe that the statutory amount of damages is insufficient to offset losses which they may sustain may well utilize the accident insurance companies to furnish them with additional protection. Application of this rule would greatly simplify trials of the nature and extent of injuries. The method of administration of the system would be by a commission, which with its own inspectors and experts would make such investigation of each accident as is necessary within a very short time after it occurred — a few days at most, instead of many months or even years.

The substitution of statutory damages for jury damages of course presents practical difficulties. Medical expenses and loss of earnings are, however, helps to a definite basis in many cases, although the latter test cannot be followed as largely as it is under the workmen's compensation acts. Arbitrary sums will have to be allotted for different injuries — a broken leg will command one sum, a severed hand or a nervous shock another sum. It is not in fact possible to estimate bodily injury in terms of money, yet that is precisely what the jury is supposed to do to-day. Each jury flounders about, takes off something from the size of the verdict because of doubts about liability, perhaps averages the estimates of different members, and blunders to a result.¹ A table worked out in advance by a commission, after the study of each general type of case, would seem to be likely to be at least as satisfactory as the haphazard results reached by juries.

III

The handling of railroad and street railway accident claims upon an insurance basis instead of upon the present fault basis would result in prompt and sure payment to the persons injured of amounts fixed by law and not dependent upon the energy and skill of counsel. If Mrs. Smith should be injured she could learn from a public officer the amount which she was entitled to receive from the company.

¹ See elaborate notes upon jury verdicts in 58 L. R. A. (N. S.) (1915), pp. 30-516.

She would receive the entire amount which the company paid out on account of her claim without paying tribute to intermediaries. Payments would begin to come in shortly after the accident, at the time when she most needed the money.

At first sight this plan seems to have the defect that characterizes so many schemes of reform — somebody else must pay for it. Railroad and street railway companies are not very prosperous to-day; undue burdens upon them will mean less satisfactory service. But the handling of accident claims upon the basis here suggested need not increase the outlay of the companies — it should in fact decrease it. As already suggested, if passengers who are injured are to receive their damages without contest, the amount payable in individual cases should be considerably less than the amount of the verdicts which may be assessed under the present system. Furthermore, the companies would be relieved of heavy expense in the investigation and settling of claims and in the defending of suits. The portion of the total outlay under the present system that goes for mere expense of administration is astonishingly large. There should also be a reduction if not an elimination of payments which are secured by fraud; for with the amount of possible recovery limited there would be less inducement for fraud, and with prompt and impartial investigation of cases by a body with full powers, the chances for recovery upon dishonest claims would be slight.

Seven or eight years ago such a plan might have been called radical; to-day it must be regarded as merely an extension of tried methods. In that interval has taken place the development in this country of the workmen's compensation plans, which are simply an application of insurance principles to accidents sustained by workmen in the course of employment. This system, at first opposed by many employers, is now generally recognized to have improved the relations between employer and employee, to have operated powerfully toward the lessening of accidents, and to have eliminated much bitter litigation.

Under our constitutional system, a new plan for the money adjustment of controversies of course presents legal issues. Does the plan here suggested fall under the ban of the Fourteenth Amendment, as involving a taking of property without due process of law, or a denial of the equal protection of the laws? Can a system be legally enforced which takes away the right to a jury trial assured

by state constitutions? It is submitted that without conflicting with constitutional limitations (1) railway companies may be made liable to injuries to passengers sustained by accident in the course of transportation although not caused by negligence; (2) passengers may be required to accept a fixed or limited compensation for such injuries; (3) commission awards may be substituted for jury awards; and (4) if passengers cannot be compelled to accept the statutory plan, they may be placed in such a legal position that they will voluntarily accept it.

IV

Negligence cannot be said to be the only basis for tort liability at common law. It is a familiar historical fact that according to primitive legal conceptions in England, as in Rome and elsewhere, one was liable for all the consequences of his acts, irrespective of the care with which the acts were performed.² To early lawgivers it seemed just to visit the results of an act upon the source of the act; the instrument of harm, either animate or inanimate, was held responsible for the harm. By slow steps English courts came to recognize that as it was necessary for each individual to act in order to live and carry on his business, all who lived in society must in return for freedom to act take the chance of sustaining harm through acts of others performed with ordinary care. Courts ceased to hold that a man acts at his peril; losses unintentionally caused were, in the absence of negligence on the part of the doer, to lie where they fell.²

This principle covered such a wide field that it has, at times, been spoken of as the only principle of tort liability known to common law in its maturity.³ Yet the idea that liability may properly be imposed on grounds other than that of fault has always persisted. Thus the owner of domestic animals which escape and do damage to the land of others is held liable for such damage, even though he exercises

² Professor J. H. Wigmore, *Responsibility for Tortious Acts*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 474; also in 7 HARV. L. REV. 315; HOLMES, COMMON LAW, Lecture III, pp. 86-94; Professor Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 344.

³ Nelson, C. J., in *Harvey v. Dunlop, Hill and Denio* (Lalor) 193 (N. Y., 1843) and quoted by HOLMES, COMMON LAW, pp. 94, 95, "No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part."

every possible precaution to prevent such escape,⁴ and since the leading case of *Rylands v. Fletcher*⁵ it has been recognized that at common law one who creates an unusual situation or employs a force which may endanger others may be held liable for injuries which he exercised every precaution to avoid.

Much the most striking case of liability irrespective of fault is, however, the very rule under which accident claims such as are here discussed are daily enforced — the rule of *respondeat superior*. It is according to this rule that the master or employer is held to answer for the fault of his servant or employee, even though he himself is entirely free from blame. This liability of the employer is usually accepted without question as an instance of liability without fault, of "absolute" liability.⁶ Professor Smith quotes a remark of Augustine Birrell in regard to the first workmen's compensation act under which employers were made absolutely liable for injuries to employees: "*Respondeat superior* is a dogma which holds in its arms the new dogma of the new bill."⁷ According to Professor Smith's thinking, this classification of the rule of *respondeat superior* is wholly erroneous — not only is there not "a short step from one of these propositions to the other, . . . there is a chasm between them."⁷ The thought uppermost in Professor Smith's mind was apparently that the rule of *respondeat superior*, far from imposing a liability to a plaintiff where the injury was caused without negligence, merely requires the employer to answer for the negligence of the employee. But the controlling truth which Mr. Birrell had in mind was that in cases falling under the rule, the negligence on account of which the defendant is held is not *his* negligence, but the negligence of another person. The chain of liability is no stronger than its weakest link, and as, under the rule, the employer may be held where he is not himself at fault, the basis of *his* liability cannot be said to be negligence or fault.

The rule of *respondeat superior* has been generally accepted as just, but little has been attempted by the courts in the way of an explana-

⁴ *Wells v. Howell*, 19 Johns. (N. Y.) 385 (1822); *Holladay v. Marsh*, 3 Wendell (N. Y.) 142 (1829).

⁵ *Rylands v. Fletcher*, L. R. 3 H. L. 330 (1868).

⁶ *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 310, 94 N. E. 431, 446 (1911). Cf. HOLMES, *COMMON LAW*, p. 6.

⁷ Professor Jeremiah Smith, 27 HARV. L. REV. 254-56.

tion of its logical basis. Ordinarily the judges are content to say, "The act of the servant is the act of the master—*respondeat superior*." This, of course, is not to explain the rule, but merely to assert it in other language.⁸ It is sometimes suggested that the reason for the liability is a necessary assumption that the action would not have happened had the employee been selected with due care;⁹ yet the conduct of the employer in selecting the employee has never been allowed to become an issue in such cases. Lord Brougham stated that the reason was that the master "set the whole thing in motion."¹⁰ But between the act of the master in starting "the thing in motion" and the harm, comes the negligent act of a responsible human being. The law might be satisfied with the legal liability of the responsible human agent who was the immediate cause of the harm. The reason that it is not so satisfied may be the practical one that the employee would not ordinarily be able to pay the damages, and that it is only the employer's liability that prevents a substantial failure of justice.¹¹

⁸ This fiction is of the class which we use because we "lazily prefer to evade accounting for [it] openly and rationally." Wigmore, 7 HARV. L. REV. 399.

⁹ HOLMES, COMMON LAW, p. 6; Wigmore, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, pp. 474, 536, 537.

¹⁰ Duncan v. Findlater, 6 Cl. & F. 894, 910 (1839).

¹¹ "In all cases it" (the phrase *respondeat superior*) "points to a merely subsidiary liability of the superior, which can only be enforced against him when it is proved or patent that the inferior cannot pay for his own misdeed. This indicates, as we believe, what has first and last been one of the main causes of 'employer's liability.' Should we now-a-days hold masters answerable for the uncommanded torts of their servants if normally servants were able to pay for the damage that they do? We do not answer the question; for no law, except a fanciful law of nature, has ever been able to ignore the economic stratification of society, while the existence of large classes of men 'from whom no right can be had' has raised difficult problems for politics and for jurisprudence ever since the days of Æthelstan." 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., p. 533. See also Wigmore, 7 HARV. L. REV. 393. Yet Sir Frederick Pollock in discussing the ground for employer's liability passes over the view that the reason is to prevent wrongs from going without practical redress as being "too crude and formless to be a starting-point of fruitful discussion." POLLOCK, ESSAYS IN JURISPRUDENCE, p. 119. Sir Frederick goes on to state: "The liability of an employer to the public for injuries caused by the acts and defaults of his servants is analogous to the duties imposed with various degrees of stringency on the owners of things which are or may be sources of danger to others. The man who conducts an undertaking of any kind, or has it conducted by persons subject to his directions, is held answerable for all operations incident to it being performed with reasonable care." (*Ibid.*, p. 128.) This apparent explanation begs the whole question for the reason that in the latter case the harm is caused not by the use of things or forces by the defendant himself, but by the uncommanded acts or defaults of responsible human beings

The true explanation of the rule may involve the two latter suggestions — the fact that the business in which the accident occurs is carried on for the employer and that he is probably able to indemnify himself out of the proceeds makes it not unjust that he should bear at least a considerable part of the risk of causing injuries to persons in carrying on the business; and the fact that as a class employees have been lacking in financial ability makes it socially expedient that the employer be required to pay. Whatever the explanation of the rule, the fact is that under it the employer is, at common law, held in a way as an insurer: without fault on his own part he is required, by reason of his relations to the parties, to pay damages for injuries caused by the acts of others. True, he happens to be required to answer only for damages that are caused through fault, but the fact that he is held as an insurer only against this limited class of risks should not obscure the true basis of his liability. A *quasi* insurer's liability, absolute liability, or liability without fault it is, and liability of this character may, without doing violations to the body of principles of the common law of which this principle forms a part, be extended to cover harm occurring in the carrying on of the employer's enterprise through causes other than the single mischance of provable negligence.

V

Rules of law are by no means unchangeable; the courts may and do alter the doctrines which they have promulgated. It is the special function of the legislature to make such changes in the laws, whether judicial or legislative in origin, as are needed to meet altered conditions.¹² Constitutional protection of property rights does not in

other than the defendant, and the whole problem is to find why the law is not satisfied with the responsibility of those persons, without making the employer liable also.

¹² *Bertholf v. O'Reilly*, 74 N. Y. 509, 524 (1878). In this decision the court sustained a statute which provided that a landlord who knowingly leased his premises for saloon purposes should be liable for all losses resulting from the intoxication of any person through the sale of liquor by his lessee. The court said: "The act of 1873 is not invalid because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The Legislature may alter or repeal the common law. It may create new offenses, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the Legislature may impose upon one man liability for an injury suffered by another, with which he had no connection. But it may change the rule of the common law, which looks only to the proximate cause of the mischief,

general extend to rules of law. The fellow-servant doctrine, the doctrine of assumption of risk, and of contributory negligence sharply limited the liability of employers for industrial accidents. These rules operated to protect his property to an important degree from liability for claims of employees. Yet in passing upon the employers' liability acts, and the workmen's compensation acts the courts have unhesitatingly held that such rules could be changed or abolished.¹³ What some courts have not recognized is that rules creating new grounds for liability need no higher sanction than rules removing limitations upon liability; rules of each class merely form part of the sum total of the law fixing the legal consequences of acts or events.¹⁴

The requirement of negligence as an essential of liability in tort is little more firmly embodied in the structure of the law than was the doctrine that contributory negligence on the part of the plaintiff is a bar to liability. The question of the legal incidence of losses unintentionally caused was settled not according to unchanging principles of right but largely according to the judges' convictions of social expediency.¹⁵ What was a wise rule under earlier conditions has ceased to be a wise rule, at least in its application to certain well-

in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it." For a more recent declaration to the same effect, see the strong opinion of Sloss, J., in *Western Indemnity Co. v. Pillsbury*, 151 Pac. 398 (Supreme Court of California, 1915). *Mondou v. N. Y., N. H. & H. R. Co.*, 223 U. S. 1 (1912).

¹³ *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205 (1888); *Hawkins v. Bleakley*, 220 Fed. 378 (Dist. Ct. S. D. Ia., 1914); *Western Indemnity Co. v. Pillsbury*, 151 Pac. 398 (Cal. 1915); *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211 (1914); *Opinion of Justices*, 209 Mass. 607, 96 N. E. 308 (1911); *Mackin v. Detroit-Timken Axle Co.*, 153 N. W. 49 (Mich., 1915); *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71 (1914); *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 Pac. 554 (1911); *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 86 Atl. 451 (1913); *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431 (1911); *Jensen v. Southern Pacific Co.*, 109 N. E. 600 (N. Y. Ct. of App., 1915); *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602 (1912); *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209 (1911); *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645 (1913); *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101 (1911).

¹⁴ The decision in the *Ives* case was of course to the effect that to require an employer to answer in damages for injuries not caused by the negligence of an employer constituted a taking of property without due process of law. But see the note upon this case in 24 HARV. L. REV. 647 and the reasoning in *Western Indemnity Co. v. Pillsbury*, *supra*; *State v. Clausen*, *supra*; and *Mondou v. N. Y., N. H. & H. R. Co.*, *supra*.

¹⁵ *Western Indemnity Co. v. Pillsbury*, *supra*; *Mondou v. N. Y., N. H. & H. R. Co.*, *supra*.

marked classes of cases, and it is suggested that there is no constitutional reason why the rule should not now be changed. The legislature cannot of course ordain that one man shall answer to another because of some act or event for which he is in no sense responsible; but if a man chooses to perform acts or to have acts performed for his benefit which may even without fault upon his part endanger another, the law may decree that the doer of the act shall assume the risk of resulting damage, at least in part; it may fix the legal consequences of his acts.

In supporting the workmen's compensation acts the courts have not been inclined to sustain the authority of the legislature on the broad ground above suggested. They have rather assumed that the enforcement of liability without negligence involved a taking of property of defendants requiring and finding justification under the police power.¹⁶ They have held that the establishment of a system for the more expeditious and equitable awarding of compensation for industrial accidents with resulting improvement in working conditions was a proper and legitimate exercise of the police power. In the class of cases here dealt with, however, the defendants affected may upon other grounds be subjected to such liability.

VI

Because of the *quasi* public character of their business railroad and street railway companies may be required to pay damages for all injuries happening to passengers, other than those caused by the wilful negligence of the passengers. The absolute liability of carriers for damages to goods which they undertake to transport has long been established. This doctrine may be merely an anomaly in the law, as Professor Beale has maintained,¹⁷ but becoming firmly established in England in the 18th century¹⁸ it was universally accepted in American jurisdictions, the question as to the carriers' right to contract away this liability forming one of the most copious

¹⁶ See particularly *State v. Clausen*, *supra*; *State v. Mountain Timber Co.*, *supra*; *Western Indemnity Co. v. Pillsbury*, *supra*; *Borgnis v. Falk Co.*, *supra*; *Cunningham v. Northwestern Improvement Co.*, *supra*; *Jensen v. Southern Pacific Co.*, *supra*; *Mondou v. N. Y., N. H. & H. R. Co.*, *supra*.

¹⁷ Beale, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, p. 148.

¹⁸ *Coggs v. Bernard*, 2 Ld. Raymond 909 (1703); *Forward v. Pittard*, 1 T. R. 27 (1785).

sources of litigation.¹⁹ The rule applicable in cases of injuries to passengers, although not settled until well into the 18th century, came to be that the carrier should be held liable only if the injury was caused by some negligence of an employee.²⁰ As the law has stood, therefore, a passenger riding upon a train which also carried his baggage might, if the train were wrecked, recover for the loss of the baggage by mere proof of such loss, while in order to recover for personal injuries sustained in the same accident he would have to prove that the accident was caused by negligence. It would be rather surprising for the courts to hold that this striking difference cannot be eliminated by statute.

Railway transportation is ordinarily carried on by corporations, and the charters of the corporations are generally subject to reasonable amendment. But without resorting to this power the business of transportation may be directly and extensively regulated because it is "affected with a public interest." The defendant in the *Ives* case happened to be a railway company, and the court in its opinion, holding the Wainwright Compensation Act to be unconstitutional, took occasion to remark that had it applied to railway companies only the result might have been different.²¹ In the second employers' liability act case the court sustained the federal employers' liability law establishing absolute liability for all injuries to employees under the power of Congress to regulate commerce.²²

Statutes imposing liability upon railroads irrespective of negligence on account of damages peculiar to the business, have been repeatedly sustained; the familiar instance is of course that of the laws imposing liability for fires caused by sparks.²³

The United States Supreme Court has indeed already upheld the power of a state to require that railroads shall be absolutely liable for injuries to passengers, except such as are caused by the gross negligence of the passengers or by disregard of known rules of the company.²⁴ And this result was reached even though the statute which

¹⁹ Professor E. C. Goddard, *Liability of the Common Carrier*, 15 COL. L. REV. 399, 475.

²⁰ 2 WYMAN, *PUBLIC SERVICE CORPORATIONS*, §§ 963, 966, 977; *Ingalls v. Bills*, 9 Metc. 1 (Mass., 1845); *Readhead v. Midland Ry. Co.*, L. R. 4 Q. B. 379 (1869).

²¹ *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 305, 310 (1911).

²² *Mondou v. N. Y., N. H. & H. R. Co.*, *supra*.

²³ 3 ELLIOTT ON RAILROADS, § 1223 and cases cited.

²⁴ *Chicago, Rock Island and Pacific Ry. Co. v. Zernecke*, 183 U. S. 582 (1902).

thus extended the carriers' liability afforded the companies no offsetting limitation of damages or improvement in procedure in damage cases. If the legislature can thus subject companies to absolute liability for unlimited damages irrespective of negligence, it would seem clear that it may require them to pay reasonable fixed sums for all injuries to passengers.

The establishment of such liability would have a direct tendency to make transportation more safe²⁵; it has been found that since employers have been absolutely liable for accidents to employees the number of such accidents has decreased. Such a regulation would relate directly to the character of the service, for the protection of the passenger through compensation against financial losses from injury is as clearly part of the service as protection from the injury itself.

VII

The more difficult question is whether passengers can be required to accept limited statutory damages and to forego the chance of receiving such sums as a jury might award. But if the companies may be subjected to a commission administered statutory compensation plan, it would seem that passengers might be required to accept the plan. The right to regulate springs primarily from the character of the business, not from the character of the person who happens to be affected by the regulations. Companies may be subjected to regulations merely because and in so far as they are engaged in a business affected with a public interest. Why may not persons who use a business which is regulated for their benefit be themselves required to submit to the regulations? If the state can say to the companies, "You must in form or in effect insure your passengers to the extent prescribed by statute against the risks of your service," may it not also say to the passengers, "If you choose to use the service you shall be deemed to have thereby accepted the statutory basis for any injury you may sustain through such service"? The passenger's surrender or loss of the uncertain prospect of jury damages may well be regarded as his contribution to the statutory plan designed to secure him prompt and sure though limited compensation. A similar line of reasoning has been relied

²⁵ See *Mondou v. N. Y., N. H. & H. R. Co.*, *supra*.

upon in sustaining compulsory workmen's compensation acts under the police power.²⁶

VIII

If passengers cannot be required to accept a statutory compensation plan by following a course similar to that adopted in establishing workmen's compensation acts, they might perhaps be induced to accept it. In order to avoid the question as to the right of the legislature to compel employers to pay for injuries not caused by negligence most of the states which enacted such legislation, after the decision in the Ives case, made their acts elective. In theory the employer could elect either to provide compensation under the act or to pay damages at law as before, but the three defenses — the fellow-servant doctrine, contributory negligence, and assumption of risk — which constituted the bulwark of defense, were abolished by the acts as to employers not electing to come under them, although retained as to actions brought by employees not accepting the statutory compensation. This change, sustained by the courts against attack on constitutional grounds as above indicated,²⁷ had the practical effect of causing employers and employees both to accept the acts. Vigorous attack has been made upon this plan as a piece of legislative trickery,²⁸ but this is by no means the first instance in the development of the law in which fiction has done beneficent service.

For the support of the proposed railway-compensation plan a

²⁶ *State v. Clausen*; *State v. Mountain Timber Co.*; *Western Indemnity Co. v. Pillsbury*; *Jensen v. Southern Pacific Co.*, *supra*. Note 13.

"It is not accurate to say that the employee is deprived of all remedy for a wrongful injury. He is given a remedy. To be sure, the compensation or recovery is limited, and that in a sense may possibly constitute a taking; but, if so, it is his contribution to an insurance scheme designed for his benefit, and may be justified on precisely the same grounds as the contribution exacted of the employer has been. . . . He is now assured of a definite compensation for an accidental injury occurring with or without fault imputable to the employer, and is afforded a remedy which is prompt, certain, and inexpensive. In return for those benefits, he is required to give up the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all after long delay, must go to pay expenses and lawyer's fees." *Jensen v. Southern Pacific Co.*, *supra*, at pp. 603, 604.

²⁷ See particularly *Borgnis v. Falk Co.*, *supra*; *Opinion of Justices*, *supra*; *State v. Creamer*, *supra*. See also *Assaria State Bank v. Dolley*, 219 U. S. 121 (1911).

²⁸ Professor Ernst Freund, *Constitutional Status of Workmen's Compensation*, 6 ILL. L. REV. 432.

similar course is open. The right to recover for damages and to have damages assessed by a jury is of little practical value unless it can be enforced against the company itself by means of the doctrine *respondeat superior*, and that doctrine may be modified or abolished.

The rule of *respondeat superior* is a mere doctrine of the common law worked out by the courts in the same manner as such doctrines, as, for example, the fellow-servant, assumption of risk, and contributory negligence doctrines. The phrase is said to have originated in the Statute of Westminster II, but the liability under the statute was purely subsidiary; it could be enforced only when it was proved or patent that the inferior could not pay for his misdeed.²⁹ In the 16th and 17th centuries masters were apparently held for the torts of servants only when they commanded or ratified them.³⁰ In the 18th century, when the employment of large groups of men in occupations in the course of which others might be injured became more general, the courts came to hold that there was an implied command by the master to the servants for the commission of such acts. Later we find the rule flatly laid down that the master or employer is liable regardless of command or ratification, express or implied, for the torts of his servant or employee committed while acting in the scope of their general employment. The rule thus fixing liability slowly worked out by the courts maturing at a comparatively late date, has no higher sanction than any other common-law rule.

No man has a property right in a mere legal doctrine.³¹ When an accident or other event happens existing legal rules give rise to property rights entitled under our system to constitutional protection, but no such rights spring from mere potential accidents or events. As already stated, this general principle was strikingly enunciated by the courts in passing upon the abolition of defenses by the workmen's compensation acts. In a recent decision the New York Court of Appeals has expressly recognized that the rule of *respondeat superior* may be altered or abolished like the rules as to

²⁹ POLLOCK AND MAITLAND, 2 HISTORY OF ENGLISH LAW, 2 ed., p. 533.

³⁰ Wigmore, Responsibility for Tortious Acts, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, pp. 520, 535.

³¹ *Munn v. Illinois*, 94 U. S. 113, 134 (1876); *Martin v. Pittsburg & Lake Erie R. Co.*, 203 U. S. 284 (1906); *Mondou v. N. Y., N. H. & H. R. Co.*, *supra*. See also cases cited in note 13, *supra*.

the common-law defenses.³² In the instance here suggested the application of the principle will operate to restrict the rights of the plaintiffs, while in former cases it has operated to increase them; but the soundness of the principle does not depend upon the result of its application in the particular instance.

Blameworthiness became established as the chief basis of tort liability before the development of modern industrial conditions under which large groups of men of limited financial resources are employed in conducting operations which may cause injury. To meet the changed conditions courts worked out the doctrine of the liability of employers for the faults of employees. This was but a crude device; it imposed unlimited liability, difficult of determination, upon persons not themselves at fault, for a very limited class of the hazards to which the business exposed others. If the legislature now makes a thoroughgoing attempt to meet the necessities and equities of the situation by a frank application of a basis of liability having nothing in common with blameworthiness, then the peculiar doctrine of *respondeat superior* by which the courts roughly met the situation may be abandoned. In a sense the change proposed would be a partial reversion to the earliest principles of liability and there would be no need of preserving a rule which would have become a mere relic of an intermediate stage of development.

Nor is there any sound objection to abolishing the rule of *respondeat superior*, so far as it applies to railway accident cases, while leaving it in full force in its application to other classes of cases. An arbitrary attempt to refuse to apply to some cases a rule applied to all others would constitute a denial of the equal protection of the laws, but no such denial is involved if the cases differently treated fall within a distinct class, as to which the application of a different rule has a logical basis.³³ This is, of course, a well-settled doctrine,

³² Jensen v. Southern Pacific Co. *supra*, at p. 604.

"In the way modern undertakings are conducted it is rarely possible to trace personal fault to the employer, but he has been held liable for wrongs of others under the doctrine of *respondeat superior*. That doctrine has been developed by the courts. . . . No one has a vested right under the Constitution to the maintenance of that common-law doctrine, which undoubtedly may be extended or curtailed by the Legislature."

³³ Miller v. Wilson, 236 U. S. 373 (1915) and cases cited; Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205, 209 (1888).

"The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. . . . And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not

and it has been applied even to the abolition of the defense of due care of the defendant in railway negligence cases. Under it the abolition of the three defenses above referred to in employers' liability cases, while leaving them in effect as to other cases, has been sustained.³⁴ It would seem that the courts would hardly fail to hold that accidents to passengers form a special class of cases, and that, if the claims so arising are dealt with under a compensation or insurance plan, the common-law rule of liability in such cases may be restricted even to the point of abolishing the liability of employers for negligence not the result of command or assent of the employer.

IX

The right to a jury trial in actions at law is expressly guaranteed by state constitutions and the elimination of this right which is essential to the success of the plan presents more difficulty than the change as to the rules of liability. The above discussion is intended to suggest grounds for meeting this difficulty. Such express guaranties have not operated to prevent the sustaining of the workmen's compensation acts. Where the act is elective in form as to the employee as well as to the employer there is no difficulty, for the right of a jury trial may of course be waived,³⁵ and is waived by choosing a remedy not enforced by such a trial. In sustaining the compulsory acts under the police power, courts have held that the right to establish the plan necessarily carried with it a right to make it effective by requiring plaintiffs to accept it.³⁶ Some courts have relied upon the ground that the guaranties do not cover remedies administered by commissions, and have held that where the compensation was to be paid from an insurance fund the right to enforce collection was not in any event a controversy at law, such as is contemplated by the guaranty.³⁷ For railway cases it would seem readily possible in shaping the details of the legislation to give

open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

³⁴ See cases cited under note 13, *supra*.

³⁵ *Foster v. Morse*, 132 Mass. 354 (1882).

³⁶ *State v. Clausen, supra*; *State v. Mountain Timber Company, supra*; *Jensen v. Southern Pacific Co., supra*.

³⁷ *Mackin v. Detroit-Timkin Axle Co., supra*; *Borgnis v. Falk Co., supra*; *State v. Creamer, supra*; *Cunningham v. Northwestern Improvement Co., supra*.

plaintiffs such a right against an insurance fund, rather than anything which could be called an action against the company.

The foregoing is not submitted as an exhaustive consideration of any of the practical or legal questions involved, but in the hope of starting a discussion which may lead to the working out and adoption of a plan having the supreme merit of creating another great class of cases in which the remedy is simple, prompt, and effective. In establishing such a plan for the adjustment of claims for injuries to passengers it may be possible to provide similar compensation for injuries caused by railways to persons other than passengers; but such an extension presents certain issues not discussed in this article.

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